92-839

No. _____

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In The

# Supreme Court of the United States

October Term, 1992

FREIGHTCOR SERVICES, INC.,

*Petitioner,*

v.

VITRO PACKAGING, INC.,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI AND APPENDICES

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## QUESTION PRESENTED FOR REVIEW

In light of this court's holding in *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984), does 49 U.S.C. sec. 10762, or any other section of the Interstate Commerce Act, provide the Interstate Commerce Commission with a specific statutory mandate to declare a common carrier's filed distance rate tariff retroactively void solely because the carrier failed to comply with ICC regulations for the determination of distances?

## LIST OF PARTIES

Petitioner Freightcor Services, Inc. (hereinafter "Freightcor") is a corporation previously engaged in common carrier transportation of freight in interstate commerce. Respondent Vitro Packaging, Inc. (hereinafter "Vitro") is a corporation engaged in the manufacture and sale of glass bottles and containers.

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To The United States Court Of Appeals
For The Fifth Circuit

## PETITION FOR WRIT OF CERTIORARI AND APPENDICES

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 969 F.2d 1563 and reprinted at Appendix B. The order of the United States District Court for the Northern District of Texas (Fitzwater, J.) granting summary judgment for Petitioner, is unreported and is reprinted as Appendix A.

## JURISDICTIONAL BASIS

The judgment of the United States Court of Appeals for the Fifth Circuit was dated, filed and entered on August 14, 1992. This court has jurisdiction under 28 U.S.C. sec. 1254(1). The petition herein was timely filed pursuant to 28 U.S.C. sec. 2101(c).

## STATUTES INVOLVED

49 U.S.C. sec. 10761. Transportation prohibited without tariff.

> Except as otherwise provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff.

49 U.S.C. sec. 10762. General tariff requirements.

> (a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation

> or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. . . .
>
> * * *
>
> (e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

## STATEMENT OF THE CASE

Freightcor Services, Inc. ("Freightcor") is a motor common carrier operating pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission ("ICC"). Freightcor operated under Title 49 of the United States Code which governs transportation in interstate commerce.

Pursuant to 49 U.S.C. sec. 10762(a) Freightcor published a tariff containing rates, *inter alia*, in cents per mile and filed it with the ICC in 1986. The filed tariff specified that a distance guide published by a third party and filed with the ICC was to be utilized for a determination of distances. Freightcor failed to follow ICC regulations set forth at 49 U.S.C. sec. 1312.4(d) requiring it to provide the publisher of the distance guide with a power of attorney. Freightcor brought a civil action against Vitro Packaging,

Inc. ("Vitro") to collect freight charges based upon this filed tariff.

On March 15, 1991 the United States District Court for the Northern District of Texas entered summary judgment in favor of Freightcor for the amount prescribed by the tariff. On August 14, 1992 the court of appeals reversed finding the tariff void by virtue of the failure by Freightcor to follow ICC regulations requiring Freightcor to provide a power of attorney to the publisher of a distance guide which Freightcor's filed tariff incorporated by reference.

## I. REASONS FOR GRANTING THE WRIT.

### A. The Opinion Below Is Inconsistent With This Court's Previous Opinions Interpreting The Tariff Rejection Provisions Of The Interstate Commerce Act.

One of the many requirements of the Interstate Commerce Act is that motor common carriers subject to ICC authority may provide regulated services only pursuant to tariffs filed with the Commission. 49 U.S.C. sec. 10761(a). Common carriers are specifically forbidden to provide such services in the absence of tariffs and "may not charge or receive a different compensation" than the rate specified in the tariff. 49 U.S.C. sec. 10761(a). By requiring filed tariffs and strict compliance with them, the Act seeks to avoid unjust discrimination and to give shippers an advance opportunity to challenge proposed rates. To achieve this protection, the Act provides explicit procedures, remedies and penalties.

Chronologically, the first step in fixing a new rate, or changing an existing one occurs when the motor common carrier files with the Commission a new tariff, which may not take effect until a specific advance notice period has elapsed. 49 U.S.C. sec. 10762(c)(3). A subdivision of the same section that governs tariff filings provides that the Commission may reject such a "submitted" tariff if the tariff "violates this section or a regulation of the Commission carrying out this section." 49 U.S.C. sec. 10762(e). If the Commission accepts the tariff for filing, the next step under the statutory plan allows the Commission to suspend the effectiveness of the new tariff – before it becomes effective – for a period of seven months after the tariff would otherwise go into effect and to commence an investigation into its lawfulness. 49 U.S.C sec. 10708(b).

If the Commission pursued this course of action, it can also require the carrier to "keep account" of the revenues collected and to make refunds if the tariffs are ultimately found unlawful. The suspension period is limited, however, to a specified time period after which the tariffs go into effect if the Commission has not completed its inquiry. At the end of the investigation, the Commission can also prescribe new rates for the future if the filed tariff is found to be unlawful. 49 U.S.C. sec. 10704.

If the tariff goes into effect, the shipper may, at any time, file a court complaint for overcharges, i.e. payment of charges in excess of the filed tariff pursuant to section 11706(b). Alternatively, the shipper can sue for damages under 49 U.S.C. sec. 11705(b)(3) and 49 U.S.C. sec. 11706(c)(2) if the carrier has collected the published tariff

rate but that rate is unlawful under the substantive standards of the Act (e.g., because it is unreasonably high).

The opinion below is patently inconsistent with the foregoing statutory plan because it fails to give legal effect to a filed tariff as required by 49 U.S.C. sec. 10761(a). The filed tariff was never rejected by the Commission upon filing as pursuant to sec. 10762(e). The Commission never suspended Petitioner's tariff pursuant to 49 U.S.C. sec. 10708(b). Respondent has never commenced an ICC proceeding to determine the rate to be applied in the future pursuant to 49 U.S.C. sec. 10704; nor has Respondent commenced a civil action for damages incurred by Petitioner's referenced to the distance in its filed tariffs, pursuant to 49 U.S.C. secs. 11705(b)(3) and 11706(c)(2).

The opinion below collaterally reviews and gives legal effect to 49 C.F.R. sec. 1312.4(d) which declares a filed tariff "void as a matter of law" where that filed tariff refers to another filed tariff the publisher of which has not been furnished a power of attorney. In essence the court below found that Freightcor's *filed* tariff containing *filed* rates stated in cents per mile which *filed* tariff lists another *filed* tariff for more computation of distances is retroactively void. As more specifically discussed below, this Court has held that the Commission has no general power to retroactively reject a filed tariff. *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354, (1984). Tariffs may only be retroactively voided where the Act provides a specific statutory mandate to the ICC and the retroactive voiding is closely tied to that mandate. *Id.* at 367.

The "specific" statutory mandate to the ICC which the court below relied upon to retroactively void Petitioner's filed tariff is the National Transportation Policy as codified at 49 U.S.C. sec. 10101. However, the National Transportation Policy provides no mandate to the ICC.

In *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354, *reh'g. denied*, 468 U.S. 1224 (1984), in an unanimous decision, it was held that 49 U.S.C. sec. 10762(e) (which authorizes the ICC to reject motor carrier tariffs if they violate statutory or regulatory requirements, such, for example, as 49 C.F.R. sec. 1312 concerning publishing and filing tariffs) does not confer upon the ICC the broad power to nullify filed tariffs *retroactively*. When faced with the clear holding of this case, it is difficult to imagine how the ICC continues to maintain, as it recently did in *Jasper Wyman & Son, et al. – Petition for Declaratory Order*, 8 I.C.C. 2d 246 (1990), that the retroactive voiding provision of 49 C.F.R. sec. 1312.4(d) is valid and permits it to ignore filed tariffs.[1] Although this Court in *American, supra*, in a 5-4 vote,[2] decided that the ICC had requisite authority to reject effective tariffs submitted in substantial violation of a

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[1] The *Jasper Wyman* decision is on appeal to the U.S. Court of Appeals for the District of Columbia Circuit in No. 92-1037, *sub. nom. Overland Express, Inc. vs. Interstate Commerce Commission.*

[2] In Part A of the opinion, the Court *unanimously* found that the ICC did not have retroactive authority based upon 49 U.S.C. sec. 10762(e) to nullify effective tariffs if they violated the ICC's tariff publishing regulations.

rate-bureau agreement, limitation of this authority was confined only to those situations involving "a specific statutory mandate of the Commission . . . [upon which] the exercise [its] of power must be directly and closely tied to. . . . " *Id.*, at 367.

Both the ICC in *Jasper Wyman* and the Fifth Circuit in the case at bar have failed to identify any statutory mandate other than the National Transportation Policy and, although the opinion is unclear, apparently 49 U.S.C. sec. 10762(b) which is a general provision requiring the Commission to prescribe tariff publishing rules. Plainly, 49 C.F.R. sec. 1312.4(d) was promulgated pursuant to 49 U.S.C. sec. 10762(b). Yet, 49 U.S.C. sec. 10762(b) is devoid of any provision governing a carrier's failure to comply with the formal manner of publishing tariffs required by that section. Instead, Congress established 49 U.S.C. sec. 10762(e) to govern rejection of tariffs, wherein it is succinctly stated that: "The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section." Thus, it is evident from the clear reading of the statute Congress intended that *any* regulation concerning the rejection of tariffs promulgated pursuant to 49 U.S.C. Section 10762(b) was to be governed by 49 U.S.C. sec. 10762(e). Moreover, in *American* it was found that this rejection power could not be used retroactively:

> [T]he language of subsection 10762(e) and the structure of the Commission's remedial authority under the Interstate Commerce Act (ICA) as amended, 49 U.S.C. Section 10101 et seq. persuade us that Congress could not have meant

> subsection 10762(e) to confer on the Commission a broad power to nullify effective tariffs retroactively.

*Id.*, at 361-62.

The ICC stated in *Jasper Wyman* that it did not retroactively reject the carrier's tariff as void. 8 I.C.C. 2d 258. Rather, it claims the filed tariffs are not effective. This Court has, however, determined that where the Commission had already accepted the tariff as filed, to interpret the ICC's power to *reject* a tariff as also including a license to *revoke* it, "would be contrary to the plain language of the subsection." *American*, 467 U.S. at 362. Moreover, this Court found that allowing retroactive rejection of filed tariffs under sec. 10762(e) would impermissibly afford the Commission far greater authority than is provided under 49 U.S.C. sec. 10704(b), relating to the Commission's authority to cancel effective tariffs and prescribe new rates for the future based upon a reparations finding.

In *American* it was also noted that since the Commission's power to suspend and investigate rate filings is limited to seven months after the proposed tariff's effective date and final action must be taken only after a full hearing (See 49 U.S.C. sec. 10708), to read 49 U.S.C. sec. 10762(e) as allowing retroactive rejection of effective rates would render the constraints of 49 U.S.C. sec. 10708 "nugatory." 467 U.S. at 363. Here the Commission has not explicitly rejected Freightcor's tariffs for failure to provide the publisher of the filed distance guide with a power of attorney before they became effective; for doing so would have clearly run afoul of this Court's holding in

*American*. Significantly, in order to distinguish *American*, the ICC found in *Jasper Wyman* that the carrier's distance rates were never "effective". However, in *American* it was stated clearly that "effective tariffs" means tariffs that are filed with the agency and have "gone into effect." *Id.*, at 360. The definition of "effective tariffs" is further clarified in footnote 4 of the *American* decision, wherein it is stated:

> Prior to 1979, the Commission had no need to reject *effective tariffs*, because the Commission's staff examined every filing prior to the *effective date* of the proposed tariff and if an obvious defect was discovered the tariff was rejected immediately. . . . Since then, the Commission has reviewed only a random sampling of tariff filings, and tariffs with obvious defects inevitably are *permitted to go into effect*. (Emphasis added).

*Id.* The Commission itself, prior to the *American* decision, had always held that a tariff which was submitted in a technically defective manner was "not a nullity" and the shipper's recovery was limited to actual damages. *See Boren-Stewart Co. v. Atchison, T. & S.F.R. Co.*, 196 I.C.C. 120 (1933); *Acme Pet Products, Ltd. v. Akron, C. & Y.R. Co.*, 277 I.C.C. 641 (1950). This Court in *American*, at footnote 7, not only cited these two cases with approval, but even adopted the statement from *Acme Pet Products* that "where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender." 467 U.S. at 364.

The Commission definition of an "effective" tariff in *Jasper Wyman* is consistent with the definition adopted by this Court in *American*, and the previous ICC decisions cited herein. In *Jasper Wyman* the Commission stated:

> These tariffs, although not complying with all of the tariff regulations *could be considered on file* because they had met the threshold requirement (i.e., they had been sent to the Commission and had not been rejected at the outset). [Emphasis supplied].

*Id.* at 259. Here, Freightcor met the same standard: the Freightcor distance rate tariff, including its provision incorporating the filed distance guide by reference, was on file with the Commission and had not been rejected at the outset. Thus it was effective under the Commission's own standard enunciated and ignored in *Jasper Wyman*. It is clear from *American* that the filed tariffs of Freightcor are not to be disregarded or voided merely because of an irregularity in tariff filing requirements.

While it is clear that the ICC has no power pursuant to 49 U.S.C. sec. 10762 to retroactively reject effective rates, neither can Vitro find solace in Part B of the *American* opinion allowing for rejection under the Commission's so-called "discretionary powers." These discretionary powers, however, derive from 49 U.S.C. sec. 10321(a) and are limited in application only when necessary to achieve other specific statutory goals. *Id.*, at 367. In *American* the other specific statutory purpose was to insure compliance with rate-bureau agreements (governed by a separate statutory provision that provided exemption from the antitrust laws). Here there is no provision of the Act relevant or even evident other than

49 U.S.C. sec. 10762 which deals with the Commission's general authority to prescribe rules and regulations concerning the filing of tariffs. Pursuant to *American* the Commission has no power or authority to retroactively enforce 49 C.F.R. sec. 1312.4(d), either in conjunction with, or as an adjunct to, 49 U.S.C. sec. 10762(e) through rejecting Freightcor's filed tariff. In *Jasper Wyman* the Commission stated that the tariffs under attack in *American, supra,* could not be treated as void because they were filed (i.e. they had been sent to the Commission and had not been rejected at the outset). So here, Freightcor's tariff had been sent to the Commission and not rejected at the outset. Thus under *American* it cannot be treated as void.

Unlike the ICC in *Jasper-Wyman,* the court below correctly begins with the premise that its decision is governed by this court's decision in *American*. Under *American,* the court must find that retroactive rejection power must be pursuant to a specific statutory mandate and that the rejection power be closely tied to that mandate. In the matter at bar, the Court of Appeals found the specific statutory mandate authorizing the ICC to retroactively reject a filed tariff to be the National Transportation Policy. A review of the National Transportation Policy portion of the ICA indicate that it provides no specific

mandate to the ICC.[3] Indeed the ICC attempt to use the National Transportation Policy to void effective tariffs in its *Negotiated Rates I* policy statement was rightfully rejected by this Court in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

Although it is not entirely clear, the court below apparently also relies upon 49 U.S.C. sec. 10762(a)(1) of the Act to retroactively reject Freightcor's tariffs. However, neither can 49 U.S.C. sec. 10762 be used as a statutory mandate to retrospectively void Freightcor's filed tariff. This is so because Congress established 49 U.S.C. sec. 10762(e) to govern *all* rejections of tariffs established under rules promulgated pursuant to sec. 10762. The language of sec. 10762(e) states:

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[3] It is to be further noted that on another occasion the Fifth Circuit did *not* place any faith in the general National Transportation Policy of 49 U.S.C. sec. 10101, that it now endorses. See *Central Forwarding, Inc. v. Interstate Commerce Commission*, 698 F.2d 1266 (5th Cir. 1983), *rehrg. denied, id.* (May 13, 1983), wherein the court held:

> We cannot agree with the . . . contention that sec. 10101 is a source of ICC rulemaking authority. Based on the wording of the statute, its legislative history, and prior judicial constructions, we conclude that the National Transportation Policy operates to constrain rather than grant rulemaking authority.
>
> * * *
>
> Finally, construing the National Transportation Policy, which paraphrased says little more than 'go forth and do good', as a congressional grant of rulemaking authority might well amount to an unconstitutional delegation of legislative authority.

> The Commission may reject a tariff submitted by a common carrier under *this* section if that carrier violates *this* section or regulation of the Commission carrying out *this* section. [Emphasis supplied].

Thus Congress clearly intended *any* regulation concerning the rejection of tariffs promulgated pursuant to sec. 10762 to be governed by subdivision (e) thereof. Thus, the court below erred by failing to find the specific statutory mandate other than sec. 10762 as required by this Court's decision in *American*.

This Court in *American* specifically found that sec. 10762(e) alone could not be used to retroactively void a filed tariff. Instead sec. 10762(e) is limited to rejections of tariff upon filing. Retroactive rejection of filed tariffs was allowed by this Court only when some other statutory mandate beside sec. 10762 existed. With respect to the second prong of *American*, that the retroactive rejection power be closely tied to the specific statutory mandate, the opinion below misses the mark. While claiming the rejection power fosters the statute's purpose of providing open rates, known to all, the net effect of the retroactive rejection is to enable the carrier and shipper to enter into secret rate agreements thus instead actually frustrating the Act's paramount purpose. Indeed a motor common carrier and a shipper could secretly scheme to render a tariff void in order to provide a preference to the shipper by failing to provide the publisher of a referred to tariff with the power of attorney required by 49 C.F.R. sec. 1312.4

Even assuming arguendo that Freightcor did not comply with the ICC regulations governing the use of

distance rates, and thus the ICC could properly void reference to the mileage guide tariff, it is clear from *American* that the filed tariffs of Freightcor are not to be disregarded or voided merely because of an irregularity in tariff filing requirements. *See also, Davis v. Portland Seed Co.*, 264 U.S. 403 (1924); *Berwind-White Coal Mining Co. v. Chicago and E. R.R.*, 235 U.S. 371 (1914).

In *Davis*, a shipper challenged a carrier's right to collect its filed tariff rate, contending that it violated a substantive portion of the Interstate Commerce Act. This Court acknowledged this violation by the carrier, but held, nonetheless, that the illegality of the filed tariff did not void its application. "The statute requires rigid observation of the tariff without regard to the inherent lawfulness of the rates specified. . . . " *Id.*, 264 U.S. at 404. Likewise, here the Act requires adherence to Freightcor's filed distance rate tariff despite the failure to provide the publisher of the distance book referred to in Freightcor's tariff with a power of attorney.

In *Berwind* it was argued that the carrier did not comply with ICC tariff format regulations when it filed a book of rules and letters setting forth its demurrage charges. As here, the shipper challenged the carrier's collection charges based upon the "filed" documents because they did not comply with ICC regulations. The Supreme Court held:

> But the contention [non-compliance with tariff regulations] is without merit. The documents were received and placed on file by the Commission without any objection whatever as to

> their form and it is certain that, as a matter of fact, they were adequate to give notice.

*Id.*, 235 U.S. at 375.

Similarly, here mileage rates, published in a tariff referring to another tariff as a governing publication for calculation of mileages, were placed on file at the ICC without any objection being made for more than six years after filing. Certainly, as documents on file with the ICC they are adequate to give notice of the applicable mileages. Even if Freightcor's reference to another tariff is void, at worst the term "miles" becomes ambiguous and the shipper would be entitled to any reasonable determination of mileage.

In *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1750 (1983), the continued vitality of *Davis* and *Berwind* was acknowledged. In *Genstar*, a shipper argued that the collection of tariff rates should be precluded because of an alleged unlawfulness in the carrier's tariff which, although filed, did not comply with ICC regulations. *Id.*, at 1308. The shipper had asserted its right to the full refund of an illegal rate increase, "not from the establishment of unlawful rates but from the unlawful publication of tariffs." *Id.* The shipper further maintained that unlawfully published tariffs could not serve to increase the transportation rate. The shipper objected to the publication because the carrier's increase exceeded previously approved levels and the updated tariffs did not "plainly state the changes proposed to be made in the schedules then in force as required by 49 U.S.C. sec. 6(3) (now revised as 49 U.S.C. sec. 10762)." *Id.* at 1308. The shipper also objected to the

tariffs because they failed to "contain the appropriate symbols (required by agency regulation) or in any other way indicate the nature of the rate change." *Id.* at 1308. After reviewing these claims of tariff non-compliance the Court of Appeals for the D.C. Circuit held:

> The Supreme Court long ago rejected the view that a tariff on file with the Commission and never rejected by it should be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate. [citation to *Davis* omitted], or some irregularity in the tariff filing formalities [citation to *Berwind* omitted]. The principle in these cases is that where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness of irregularity.

*Id.* at 1308.[4]

In *Ex Parte No. MC-370, Tariff Improvement*, 365 I.C.C. 43 (1981), the ICC published a rule (49 C.F.R. Section 1312.7(f)(1)) stating that whenever a carrier files a tariff increasing rates without symbolizing the increase as required by ICC regulations, the tariff is unlawful and, unenforceable. This rule was criticized by the United

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[4] Note that the remedy mandated by the ICC in *Jasper Wyman*, a voiding of the tariff, may require re-audit and application of a higher rated tariff, resulting in still higher charges to the shipper, contrary to the remedy indicated by the *Genstar* Court! This would occur, for example, where a distance commodity rate is void and a higher class would become applicable instead.

States Court of Appeals for the District of Columbia Circuit in *Genstar, supra*, 665 F.2d at 1309, and actually set aside by this Court in *Aberdeen and Rockfish R.R. Co. v. United States*, 682 F.2d 1092 (5th Cir. 1982), *cert. granted, judgment vacated and remanded for findings in light of Interstate Commerce Commission v. American Trucking Association, Inc.*, 467 U.S. 1237 (1984). Thus, Vitro's contention in this case that the carrier's distance rates cannot be used because the ICC tariff publication rules were not fully complied with is flatly refuted by this Court's decisions in *American, Rockfish, Berwind* and *Davis*.

### B. The Courts Of Appeal Are Split On The Question Of Whether Or Not Violation Of ICC Regulations Voids A Filed Tariff.

Recently, an argument similar to that advanced by Vitro was rejected by the Ninth Circuit in *Interstate Commerce Commission v. Transcon Lines*, 968 F.2d 798 (9th Cir. 1992). There, the Ninth Circuit affirmed that part of a district court ruling that enjoined an attempt by the ICC to utilize its credit regulations to bar the collection of a motor common carrier's filed tariff rates. Although the Ninth Circuit reversed the lower court's ruling that secret account codes published in a tariff could be ignored, the Ninth Circuit affirmed the lower court's alternative ruling that the ICC, by regulation, could not disentitle the carrier to the collection of its filed tariff charges. Relying upon this Court's decision in *Maislin, supra*, the Ninth Circuit stated, "Regulations, however valid in other contexts, cannot furnish the reason for letting the carrier abandon the filed rate. The ICC's interpretation of these regulations to allow such a result, then, has no greater

force than the policy rejected in *Maislin*."[5] Because the opinion below holds that ICC regulations may void a filed tariff and the Ninth Circuit in *Transcon Lines, supra*, held that they may not, this Court should grant the petition for certiorari in order to resolve this conflict.

## CONCLUSION

For the foregoing reasons, the Petition of Freightcor should be granted and a Writ of Certiorari issued to the United States Court of Appeals for the Fifth Circuit.

Dated: November 12, 1992.

Respectfully submitted,

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[5] Actually, this Court had already ruled to this effect, as part of its decision prior to *Maislin*, in *Southern Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982), involving the application of ICC credit regulations to invalidate a tariff.

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
|---|---|---|
| FREIGHTCOR SERVICES, INC., | § | |
| | § | |
| Plaintiff, | § | Civil Action No. |
| VS. | § | CA3-90-1879-D |
| VITRO PACKAGING, INC., | § | |
| | § | |
| Defendant. | § | |

MEMORANDUM OPINION AND ORDER

(Filed March 15, 1991)

In this action by a shipper to recover on freight undercharges, plaintiff Freightcor Services, Inc. ("Freightcor") attempts to cure deficiencies in its summary judgment evidence that caused the court to deny Freightcor's earlier-filed motion for summary judgment. *See* December 18, 1990 Mem. Op. & Order. Defendant Vitro Packaging, Inc. ("Vitro") urges the court to deny Freightcor's present motion for reconsideration, arguing it is similarly infirm. The court grants the motion.

I

Freightcor sues to recover undercharges on the basis of Interstate Commerce Commission ("ICC") FSSI 282 Item 515 and ICC FTHS 275. It also contends Tariff HGCB* MF-ICC 100-A provides the rate distance calculation to the Freightcor shipments in question. It invokes

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*Household Goods Carriers Bureau.

the lesser charge of the two applicable tariffs on which to sue for recovery.

Vitro opposes Freightcor's motion for reconsideration, contending HGCB MF-ICC 100-A does not apply because Freightcor is not a participant in a tariff issued in the name of an agent without execution of a power of attorney. Vitro also contends ICC FSSI 282 Item 515 is inapplicable to Vitro's shipment of glass bottles or glass containers.

II

A

The court originally determined there was a fact question whether ICC FSSI 282 Item 515 applied to the shipments in question. Mem. Op. & Order at 2. Freightcor has filed an affidavit that simply states the affiant's interpretation of the tariff. He reads the phrase "Building materials or supplies, and other articles" to mean "building materials" or "supplies." Vitro has filed an opposition affidavit. Its witness challenges this reading of the tariff. Vitro's affiant states it is not a natural reading to apply to a shipment of glass bottles and containers a tariff that reads as does the one in question.

The court concludes again that there is at least a fact question whether Item 515 covers the shipments in question. And it is conceivable Freightcor's position is simply incorrect, since its reading of the phrase would permit the terms "supplies" and "other articles," when read without reference to the term "Building," to mean a wide array of freight.

Summary judgment and reconsideration is denied as to this tariff.

B

Vitro also opposes summary judgment on the ground that HGCB MF-ICC 100-A, by which distance is computed for tariffs ICC-FSSI 282 Item 515 and ICC FTHS 275, is void because Freightcor is not a participant in the Household Goods Mileage Guide, ICC HGB 100. According to Vitro, certain ICC regulations (49 C.F.R. §§ 1312.13(e) and 1312.25) require that a carrier publish in its tariffs a list of all governing publications – including the Mileage Guide – if such a publication is to be used to determine distances, and the tariffs must be on file with the ICC. Vitro also argues, based on 49 C.F.R. § 1312.4(d), that a carrier may not participate in a tariff issued in the name of an agent unless a power of attorney has been executed. Freightcor replies that the Mileage Guide did not contain its tariffs, but simply filled one part of Freightcor's rate equation: the computation of the distance for the purpose of determining the distance rate. *Cf.* 49 C.F.R. § 1312.30(c)(1) (tariff containing distance rate shall contain provisions for determining distances by, *inter alia,* referring to a distance guide).

The court agrees with Freightcor that it permissibly referred to HGCB MF-ICC 100-A in tariff ICC FTHS 275 for the purpose of computing the distance rate. *See* 49 C.F.R. § 1312.30(c)(1). The mileage guide in question complied with 49 C.F.R. § 1312.30(c)(4) because, without dispute, it was on file with the ICC at the time the tariff was

published and filed. The court rejects Vitro's arguments to the contrary.

C

The court has determined that Freightcor may recover summary judgment on the basis of tariff ICC FTHS 275 but may not under the rubric of ICC FSSI 282 Item 515. Freightcor concedes in its briefing that, when two tariffs apply, the lesser charge controls. From Freightcor's viewpoint, even if it were to prevail under both tariffs it would still be obligated to accept the lesser recovery. Vitro cannot complain of a failure to adjudicate completely the applicability of ICC FSSI 282 Item 515. It is bound by its argument that this tariff does not apply. Accordingly, there is no reason to await the entry of a final judgment in this case. Freightcor shall promptly submit a judgment – approved as to form by Vitro – for entry by the court.

SO ORDERED

March 15, 1991.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
|---|---|---|
| FREIGHTCOR SERVICES, INC., Plaintiff, | § | |
| VS. | § | Civil Action No. CA3-90-1879-D |
| VITRO PACKAGING, INC., Defendant. | § | |

JUDGMENT

(Filed APR 10 1991)

For the reasons set forth in the court's memorandum opinion and order filed March 15, 1991, and based upon an uncontested submission of plaintiff filed March 28, 1991, it is ordered and adjudged that plaintiff Freightcor Services, Inc. recover judgment from defendant Vitro Packaging, Inc. in the principal amount of $19,199.17, together with prejudgment interest in the amount of $5,448.90, costs of court as calculated by the clerk of court, and post-judgment interest at the rate of 6.26% per annum.

Done at Dallas, Texas this 10th day of April, 1991.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

**APPENDIX B**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 91-1507

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FREIGHTCOR SERVICES, INC.

Plaintiff-Appellee,

versus

VITRO PACKAGING, INC.

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas

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ON PETITION FOR REHEARING*

(Opinion June 26, 1992,
5 Cir., 1992, ___ F.2D ___)

(August 14, 1992)

Before GOLDBERG, JOLLY, and WIENER, Circuit Judges.

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* The plaintiff-appellee, Freightcor Services, Inc., has filed a petition for rehearing challenging our decision and opinion dated June 25, 1991. The petition for rehearing is granted; our earlier opinion is hereby withdrawn, and the following opinion, which differs from its predecessor in part III.B(2), is entered in its place.

E. Grady JOLLY, Circuit Judge:

In this suit a bankrupt interstate carrier, Freightcor, Inc., seeks undercharges[1] from a shipper, Vitro Packaging, Inc The district court rejected Vitro's defense that, under the "filed rate doctrine,"[2] Freightcor's tariff was void because it referred to a mileage guide in which Freightcor did not formally participate. The court therefore granted summary judgment for Freightcor. For the reasons below, we today hold that a mileage guide is a tariff and that a tariff that refers to another tariff without official participation in that tariff is void as a matter of law. Freightcor therefore cannot collect undercharges against Vitro under the filed rate doctrine.

I

Freightcor, now in bankruptcy, is a common carrier operating in interstate commerce and subject to regulation by the ICC. From 1985 until 1987, Freightcor hauled glass bottles and containers for Vitro. Vitro paid rates between $.98 and $1.13 per mile. All of these charges were based upon rates that were not drawn from tariffs

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[1] "Undercharges" are the difference between the rate a shipper is billed for a shipment and the amount of the rate for that shipment according to the carrier's tariff. *See Maislin Industries U.S., Inc. v. Primary Steel,* 497 U.S. 116, 110 S.Ct. 2759, 2764 (1990).

[2] The "filed rate doctrine" requires that only a tariff duly filed with the ICC can govern the billing of shipments by common carriers. The rate, however, must be reasonable. The filed rate doctrine seeks to avoid secret rates negotiated between shippers and carriers. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 2766 (1990).

filed with the ICC, but instead were negotiated between Freightcor and Vitro.

During these years, Freightcor had two filed tariffs that are now material. Tariff ICC FSSI 282 applied to "Building Materials or Supplies." Tariff ICC FTHS 275 applied to "Freight of all Kinds, except Class A and B Explosives, Household Goods and Materials in Bulk." The rate for ICC FTHS 275 was $3.00 per mile, and the rate in FSSI 282 was considerably less.

Both FTHS 275 and FSSI 282 computed mileage for specific shipments according to the Household Goods Carriage Bureau ("HGCB") MF-ICC 100-A Mileage Guide. The parties agree that Freightcor did not file a power of attorney or concurrence with the HGCB to "participate" in the mileage guide.

Freightcor declared bankruptcy and, as debtor-in-possession, sued Vitro in U.S. district court for undercharges, or the difference between the rate actually charged and the rate posted in a carrier's applicable tariff on file with the ICC. Vitro answered alleging, among other defenses, that the proper forum for this dispute is the ICC, that the tariffs Freightcor sought to apply were void because Freightcor had not participated in the mileage guide these tariffs referred to, that an attempt to collect filed rates after negotiating a lower rate was an unreasonable practice, and that the rates sought were unreasonable. Freightcor moved for summary judgment, arguing that, under the filed rate doctrine, the sole question for the court was whether Vitro had paid the amount of money required in the duly filed tariffs that governed

Freightcor's shipments of Vitro's cargo. The court initially denied the motion, noting that a factual dispute persisted concerning the applicability of FSSI 282: whether glass bottles and containers, which Freightcor had hauled for Vitro, were included within the term "Building materials or supplies" as found in FSSI 282.

On March 15, 1991, however, the court granted reconsideration. The court rejected Vitro's defenses and held that FTHS 275 had properly referred to mileage guide HGCB MF-ICC 100-A. The court further held that, although there was a dispute with respect to the applicability of FSSI 282, there was no factual dispute as to the applicability of FTHS 275, which covered "freight of all kinds." The court therefore held that FTHS 275 was applicable. It noted, however, that because Freightcor had also contended, *viz.*, "conceded," that FSSI 282 was also applicable, the court would apply the lower rate under FSSI 282 and assess Freightcor's damages on that basis. In so doing, the court observed it was undisputed that when two tariffs are applicable, the proper rate to apply is the lower rate. Because Freightcor had contended that both FSSI 282 and FTHS 275 were applicable, it could not complain that the district court applied the lower rate to assess undercharge damages. Judgment was entered for $19,199 in principal and $5,449 in prejudgment interest. Vitro filed a motion for "new trial," which was denied. Vitro then filed this appeal.

We review *de novo* the summary judgment, applying the same standards of law as those available to the district court. *Trial v. Atchison, Topeka and Santa Fe R. Co.*, 896 F.2d 120, 122 (5th Cir. 1990). Therefore, to sustain the summary judgment rendered below, we must find that

there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

III

The heart of Vitro's appeal is its argument that the district court erred in applying the filed rate doctrine based on Freightcor's tariff FTHS 275. Vitro argues that FTHS 275 was void under ICC regulations because, although FTHS 275 refers to HGCB MF-ICC 100-A for the mileage of specific shipments, Freightcor did not give to the HGCB a power of attorney in order to "participate" in the tariff, as required by the Commission's regulations. Therefore, contends Vitro, FTHS 275 is unenforceable, and Freightcor may not collect undercharges based upon its rates. In response, Freightcor argues that the regulations do not require it to participate in the mileage guide in order to refer to it, and if they do, they still cannot be used to retrospectively void a tariff that had been otherwise duly filed and effective.

The district court found that Freightcor

> permissibly referred to HGCB MF-ICC 100-A in tariff ICC FTHS 275 for the purpose of computing the distance rate. *See* 49 C.F.R. § 1312.30(c)(1). The mileage guide in question complied with 49 C.F.R. § 1312.30(c)(4) because, without dispute, it was on file with the ICC at the time the tariff was published and filed. The court rejects Vitro's arguments to the contrary.

Thus the district court did not expressly address the effect of Freightcor's failure to file a power of attorney

with respect to the HGCB mileage guide. We read the district court's opinion as holding implicitly either (1) that the mileage guide is not a tariff, or (2) that Freightcor was not required to participate in the mileage guide, or (3) that Freightcor's mere reference to the mileage guide amounted to participation.

A

The ICC regulations make clear that whether a carrier "participates" in the tariff of another carrier or an agent is a matter of certain formalities. ICC regulation 49 C.F.R. § 1312.4(d) mandates that

> a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence is attached. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law.

The regulations do not require that Freightcor file its power of attorney or concurrence with the ICC; instead, it files such documents with the HGCB, which in turn publishes the carriers participating in MF-ICC 100-A. Freightcor did not file a power of attorney or a concurrence with the HGCB, and it therefore did not participate in the HGCB MF-ICC 100-A. The initial question for this court is, therefore, whether under the ICC's regulations Freightcor was obligated to participate in the HGCB mileage guide in order to refer to it in Freightcor's own tariffs.

First, Freightcor argues that MF-ICC 100-A is only a distance guide and not a "tariff issued in the name of

another carrier or an agent." Freightcor asserts that formal participation is only required if a carrier refers to another agent's tariffs in order to designate the rate per mile governing shipments.

We begin our inquiry, therefore, by determining whether HGCB MF-ICC 100-A is a tariff issued in the name of an agent under section 1312.4(d). "Tariff" and "agent" are defined in 49 C.F.R. § 1312.1(b).

> (2) "Agent" means a person, association or corporation authorized to publish and file rates and provisions for a carrier's account in tariffs published in the agent's name.
>
> . . . .
>
> (35) "Tariff" means a publication containing rates, classification ratings, rules, regulations, and other provisions as amended, filed in the carrier's or an agent's name.

Indisputably, the HGCB is an agent authorized to publish and file rates, and a mileage guide is a publication, containing provisions meant to be the basis for shipping bills, filed in an agent's name. Furthermore, HGCB MF-ICC 100-A was filed with the Commission in accordance with section 1312.30(a), as is required in order for Freightcor to refer to the guide. 49 C.F.R. § 1312.30(c)(4). The number "100-A" is assigned by the Commission to designate it as a tariff in accordance with section 1312.8(3). Freightcor's own tariffs describe HGCB MF-ICC 100-A as a tariff.

We conclude, therefore, that HGCB MF-ICC 100-A was clearly a "tariff" as the word is used in section 1312.4(d). The conclusion that MF-ICC 100-A is a tariff

does not, however, end our inquiry. We must determine whether a mileage guide, even though a tariff, is an exception to the general rule that a carrier who utilizes the tariff of another carrier or agent can only participate in that tariff by complying with the formalities of filing a power of attorney or concurrence with the issuing agent pursuant to section 1312.4(d).

No current ICC regulation specifically addresses this point.[3]

The ICC, however, has recently addressed the question and found that, under its regulations, reference to a mileage guide requires participation in that tariff. *Petition of Jasper Wyman & Son, et al. re: Overland Express, Inc.*, ICC Case No. 40150, 8 I.C.C.2d 246 (1992). We defer to an agency's interpretation of its governing statute and regulations, and affirm that interpretation if it has a reasonable basis in law. *Western Coal Traffic League v. U.S.*, 719 F.2d 772, 777 (5th Cir. 1983) *cert. denied* 466 U.S. 953 (1984).

In *Jasper Wyman*, the Commission addressed the fundamental argument made by Freightcor: that section

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[3] ICC regulation 49 C.F.R. 1312.27(e) provides indirect authority for such a requirement. Under section 1312.27(e), a carrier whose tariff refers to a second tariff that refers to a third tariff must either participate in the third tariff or limit its participation in the second tariff to terms that are not controlled by the third tariff. This regulation does not, however, expressly establish an obligation to participate in the second tariff.

1312.30(c)(4)[4] requires only that tariffs be on file in order to refer to them; consequently, a carrier, who only refers to a mileage table, is not required to participate in that tariff. In supporting that contention, Freightcor points out that in adopting 1984 amendments to Commission's regulations, the ICC eliminated the explicit requirement that carriers must participate in a mileage guide.[5]

The ICC, however, found that the excising of the language only removed a redundant requirement to participate in the tariffs of other carriers, *Jasper Wyman*, 8 I.C.C.2d at 251, which was set out at 49 C.F.R. § 1312.25.

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[4] 49 C.F.R. § 1312.30(c)(4) provides

> Except as provided in § 1312.13(e)(2), only distance guides on file with the Commission may be referred to. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. An agent's tariff may refer to another agent's distance guide.

Section 1312.13(e)(2) provides that rules published by the federal government need not be separately filed with the Commission.

[5] Prior to 1984, section 1310.16 provided

> Only distance guides officially on file with the Commission may be referred to. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. *All carriers parties to distance rates referring to one or more distance guides must also be parties to each guide referred to.* An agent may refer to a distance guide published in the name of another agent for the account of participating carriers also parties to the guides.

When this section became effective as revised section 1312.20, the underlined language was omitted.

Furthermore, the ICC found that the elimination of the redundant language allowed carriers, who, as private entities, could not be "parties" to government distance guides, to nevertheless use those guides. Therefore, the ICC held that the requirement of section 1312.4(d) to participate formally in the tariffs of another agent continued to apply to mileage guides. *Jasper Wyman*, 8 I.C.C.2d at 252.

The ICC's ruling – that mileage guides are tariffs, that carriers must participate in mileage guides as in any other tariff, and that the 1984 amendments did not remove this requirement to participate in mileage guides – has a reasonable basis in law. As to the first prong of the ruling, we have independently determined above that mileage guides are clearly tariffs. As to the next prong of the ruling, the Interstate Commerce Act does not distinguish between one form of tariff and another in requiring Commission regulation of joint tariffs. 49 U.S.C. § 10762(a)(l). Moreover, the text of section 1312.30(c)(4) establishes no exception to the general obligation placed upon a carrier whose tariff is governed by the terms of the tariff of another carrier or agent: it must formally participate in the tariff of the other carrier or an agent. As to the last prong of the holding, the Commission's view that the 1984 amendments did no more than delete a redundant regulation is a plausible explanation for what occurred.

We hold, therefore, that section 1312.4(d) requires that a carrier who refers to the mileage guide of another carrier or agent to participate in that mileage guide. Thus, because FTHS 275 referred to the mileage rates of HGCB MF-ICC 100-A, Freightcor was required under section

1312.4(d) to participate in HGCB MF-ICC 100-A. Freightcor filed neither a power of attorney nor a concurrence with HGCB to participate in MF-ICC 100-A. Accordingly – under regulation 1312.4(d) – FTHS 275 was "void" as a matter of law.[6]

B

Freightcor argues, however, that, even if section 1312.4(d) applies to mileage guides, its tariffs are not void because the ICC is without authority to issue regulation 1312.4(d) to the extent that it retrospectively voids a tariff

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[6] Freightcor argues that a mere irregularity in the tariff is no basis for the ICC to void the tariff, because the tariff is in substantial compliance. Freightcor cites *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304 (D.C.Cir. 1981) *cert. denied Nitrochem, Inc. v. ICC*, 456 U.S. 905 (1982); *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924); and *Berwind-White Coal Mining Co. v. Chicago & E. R. Co.*, 235 U.S. 371 (1914), in support of this position.

In *Jasper Wyman*, the ICC distinguished these cases as being suits on effective tariffs that did not conform to a regulation, as opposed to tariffs that are void or otherwise ineffective. (In *Berwind-White*, the tariff's failing was in not conforming to page format requirements; in *Davis*, the rate was too high, and in Genstar, there was an insufficient period of notice prior to the effective date.) Certainly, none of the cases were based on a statutory or regulatory provision stating that the "tariff is void as a matter of law."

We need not reach this question of substantial compliance, as there is no question but that Freightcor did not comply at all, much less substantially, with section 1312.4(d), which defines nonconforming tariffs as void. We therefore will concern ourselves with the operation and validity of section 1312.4(d) and do so according to the standards set out in *ICC v. American Trucking Assoc., Inc.*, 467 U.S. 354 (1984), which is more recent than the cases indicated by Freightcor.

that has been approved by, and is on file with, the ICC. Here, for example, Freightcor contends that it duly filed its tariff FTHS 275 with the ICC, and the ICC accepted that tariff; accordingly, it is an effective rate. The ICC, it argues, has no authority to promulgate a regulation that retrospectively voids this effective tariff.

(1)

Freightcor relies on the Supreme Court's opinion *ICC v. American Trucking Assos., Inc.*, 467 U.S. 354 (1984), and its simultaneous remand of *Aberdeen & Rockfish R. Co. v. U.S.*, 467 U.S. 1237 (1984), in contending that its tariffs are not void pursuant to the terms of section 1312.4(d). In doing so, Freightcor acknowledges that this circuit has upheld the authority of the ICC to issue regulations that void effective tariffs. *Aberdeen & Rockfish R. Co. v. U.S.*, 682 F.2d 1092 (5th Cir. 1982). It asserts, however, that by vacating *Aberdeen & Rockfish*, the Supreme Court precluded our reaching that result in this case. We disagree.[7]

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[7] The Supreme Court, in *Aberdeen & Rockfish*, 467 U.S. 1237 (1984), vacated and remanded *Aberdeen & Rockfish R. Co. v. U.S.*, 682 F.2d 1092 (5th Cir. 1982), for reconsideration in the light of *American Trucking*. Freightcor argues that this remand overruled our opinion rather than merely vacating it.

In *Aberdeen & Rockfish*, we considered an ICC regulation providing that tariffs that did not contain certain symbols denoting rate changes would be unenforceable, even if the tariffs were duly filed with the ICC. We held that the ICC did not abuse its discretion by adopting the regulation, and it was consequently enforceable. The Supreme Court granted certiorari in *American Trucking* and *Aberdeen & Rockfish* because the Eleventh Circuit opinion conflicted with our opinion in *Aberdeen & Rockfish*. *American Trucking*, 467 U.S. at 358. Ultimately, the Supreme

In *American Trucking*, the Supreme Court reviewed a holding of the Eleventh Circuit that although the ICC clearly had authority to reject proposed tariffs that did not conform to rate bureau requirements, the ICC lacked the express statutory authority to reject retrospectively a tariff that had been on file with the ICC and applied by the carrier in the conduct of its business; or, in short, the appellate court held that the ICC lacked the authority to reject, retroactively, effective tariffs. *American Trucking Assos. v. U.S.*, 688 F.2d 1337 (11th Cir. 1982).

The Supreme Court agreed that the Motor Carrier Act, 49 U.S.C. § 10762(e), does not *expressly* authorize the Commission to reject effective tariffs – a holding that Freightcor suggests controls our case today. *American Trucking*, 467 U.S. at 364. This holding, however, did not resolve the issue presented. The court proceeded further to hold that the Commission has discretion to develop extrastatutory remedies, including the remedy of voiding

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Court reversed the Eleventh Circuit's holding that the ICC may not enforce rate bureau agreements by rejecting effective tariffs. *Compare American Trucking*, 467 U.S. at 370 to *American Trucking*, 688 F.2d at 1354; *on remand American Trucking Assos. v. United States*, 744 F.2d 754 (11th Cir. 1984), *cert. denied* 467 U.S. 1240.

The Supreme Court merely vacated the judgment in *Aberdeen & Rockfish* and remanded it to this court "for further consideration in light of" *American Trucking*. *Aberdeen & Rockfish*, 467 U.S. 1237 (1984). This court then remanded the case to the ICC where it became moot when the ICC repealed the regulations that were the subject of the suit. 49 Fed.Reg. 38641 (1985). Although it is certainly true that our opinion was vacated in *Aberdeen & Rockfish*, it is incorrect to assume that the Supreme Court's remand constituted a bar to our upholding the power of the ICC to void an effective tariff.

effective tariffs. *American Trucking*, 467 U.S. at 370. In exercising this discretionary power, however, the Court prescribed a standard for the Commission to follow:

> To lie within the Commission's discretionary power, the proposed remedy must satisfy two criteria: first, the power must further a specific statutory mandate of the Commission, and second, the exercise of power must be directly and closely tied to that mandate.

*American Trucking*, 467 U.S. at 367. The court then applied that standard to the Commission's remedy of voiding tariffs that had become effective but later were found to be in violation of agreements among members of the particular rate bureaus. The Commission argued that, after the tariff had become effective, the only appropriate remedy to address a later discovered non-conforming tariff, was voiding the tariff. The court accepted the argument, saying

> [W]e agree with the Commission that its new remedy is a justifiable adjunct to its express statutory mandate. The nullification of effective tariffs submitted in violation of rate-bureau agreements is directly aimed at ensuring that motor carriers comply with the guidelines established by Congress . . .

467 U.S. at 370. Accordingly, the Supreme Court reversed the Eleventh Circuit's holding that the ICC lacked the power to enforce rate bureau agreements by voiding effective tariffs. *American Trucking*, 467 U.S. at 370.

(2)

Our question is then, in the light of *American Trucking*, whether section 1312.4(d) – in retrospectively voiding a noncomplying tariff – is within the ICC's statutory authority. Applying the standards set down by the Supreme Court, we will uphold the power claimed by the ICC in its regulation if (1) the power furthers a specific statutory mandate of the Commission, and (2) the exercise of power is directly and closely tied to that mandate. *American Trucking*, 467 U.S. at 367.[8]

Before we apply *American Trucking*'s two-step test, we briefly restate the power claimed by the Commission in our case today: the authority to declare "void as a matter of law" a carrier's tariffs that refer to other tariffs without participation in the second tariff. This power may also be characterized as a power to determine whether a tariff is effective. *Jasper Wyman*, 8 I.C.C.2d at 258. In other words, section 1312.4(d) does not authorize the ICC to act affirmatively to void a tariff. This regulation defines when a tariff *became effective* or *becomes void* through the action or inaction of a carrier.

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[8] We believe that the *American Trucking* test appropriately governs our review of section 1312.4(d), despite the procedural and substantive distinctions between 1312.4(d) (governing participation by several carriers or agents in a common tariff) and *Motor Carrier Rate Bureaus – Implementation of P.L. 96-296*, 364 I.C.C. 464 (1980)(governing the conformity of carriers' tariffs to applicable agreements of rate bureaus to which the carriers belonged), the ruling of the Commission considered by the *American Trucking* court.

The first inquiry that *American Trucking* requires us to make is whether this power claimed by the Commission furthers a statutory mandate. The relevant statutory mandate is in the Interstate Commerce Act, under which the Interstate Commerce Commission has jurisdiction to regulate the tariffs of interstate motor common carriers.[9] Congress first set forth the transportation policy it intends to govern interstate carriers in the Interstate Commerce Act, 24 Stat. 379 (1887), which has been refined in its amendments and successor acts, particularly, the Interstate Commerce Act of 1978, 92 Stat. 1337, and the Motor Carrier Act of 1980, 94 Stat. 2013. This policy is currently codified at 49 U.S.C. § 10101. As goals of this policy, federal regulation of transportation should promote fairness and efficiency.[10]

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[9] Subchapter II of section 105 of the Interstate Commerce Act provides, in part,

> . . . [T]he Interstate Commerce Commission has jurisdiction over transportation by motor carrier . . . to the extent that passengers, property, or both are transported by motor carrier (1) between a place in – (A) a State and a place in another State; . . . (2) . . . or on a public highway.

49 U.S.C. § 10521.

[10] 49 U.S.C. § 10101(a)(1) provides, in part,

> It is the policy of the United States Government . . .
> (B) to promote safe, adequate, economical, and efficient transportation;
> (C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;
> (D) to encourage the establishment and maintenance of reasonable rates for transportation, without

The courts have long recognized that a central purpose underlying the transportation policy of the Interstate Commerce Act is a Congressional mandate that the ICC regulate the relationship between carriers and agents to prevent secrecy in the negotiation of tariffs, which promotes discrimination, favoritism, market inefficiency, and artificially high rates. *See Maislin*, 110 S.Ct. at 2768, *quoting Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908). Simply put, public disclosure of the parties to each tariff promotes fairness and helps to level the playing field on which the players must know whom they are playing with and against. *See, e.g., Kansas City Southern R. Co. v. C.H. Albers Comm. Co.*, 223 U.S. 573, 597 (1912) (secret agreements between shipper and carrier forbidden).

In support of this policy, the Interstate Commerce Act specifically requires the ICC to regulate the relations among motor common carriers that have entered into joint tariffs. 49 U.S.C. § 10762(a)(1) provides, in part,

> . . . . A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subsection. The Commission may prescribe

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> unreasonable discrimination or unfair or destructive competitive practices. . . .

Furthermore, the statutory policy is directed specifically to regulate transportation by motor carrier to promote competition and efficiency so that motor carriers' services will, in sum,

> (A) meet the needs of shippers, receivers, passengers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and travelling public . . .

49 U.S.C. § 10101(a)(2).

> the other information that motor common carriers shall include in their tariffs. . . .

Thus, each motor carrier is required by statute to publish and file with the Commission all tariffs containing rates. The Commission, moreover, is under an express mandate – distinct from the mandates of the statute imposed on carriers – both to determine the nature of the information the carrier must file in each tariff and to require that this information be provided. Within this mandate to require certain information, and in the light of the policy against allowing secret agreements, we believe it is necessary, practically, for the Commission to require the identification of each participant in every tariff.[11]

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[11] As well as this general mandate of the ICC to set requirements for joint tariffs, the ICC is specifically required to monitor the use of joint classifications and rates, as well as the division of revenues collected pursuant to charges under joint rates among shippers. 49 U.S.C. § 10705(b)(1) provides:

> The Interstate Commerce Commission may, and shall when it considers it desirable in the public interest, prescribe . . . joint classifications, joint rates, (including maximum and minimum rates or both), the division of joint rates . . . for a motor common carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [*i.e.* motor carriers] with another such carrier . . .

Furthermore, 49 U.S.C. § 10701(a) provides:

> A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 [*e.g.* motor common carriers] must be reasonable. *Divisions of joint rates by those carriers (including rail carriers) must*

In sum, the congressional mandate to the ICC is that the Commission must maintain a fair and efficient transportation market, which, at the very least, does not permit secret negotiations and arrangements between carriers and shippers. Mindful of this policy, the Commission is specifically under a statutory mandate to determine what information must be provided in every joint tariff and provide mechanisms to ensure that this information is provided and is accurate. Pursuant to this obligation, we believe that there is a strong presumption that the Commission must require the disclosure of the identity of the carriers participating in every tariff.

Our second step in applying the *American Trucking* test is to determine whether the ICC's regulation – which requires that a tariff is void if the participating carrier fails to follow the prescribed procedure[12] – is directly and closely tied to the Commission's mandate under the

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*be made without unreasonable discrimination against a participating carrier and must be reasonable.*

(Emphasis added.) Certainly, the Commission cannot monitor such joint rates and joint classifications, nor can it guard against unreasonable discrimination in the use of joint tariffs unless the participants of each tariff are identified.

[12] 49 C.F.R. § 1312.4(d). The Commission has promulgated other rules that are in furtherance of this same mandate, which are not implicated by Freightcor's argument: Each tariff must list all other tariffs that govern its terms. 49 C.F.R. § 1312.13(e). Conversely, every tariff in which carriers participate must include a section listing all participating carriers. 49 C.F.R. 1312.13(c). The Commission has also detailed the form and scope of powers of attorney used by a carrier to participate in another carrier's or an agent's tariff. 49 C.F.R. § 1312.10(a).

Interstate Commerce Act. We find that this power is clearly tied to the statute as a necessary means of enforcing the Interstate Commerce Act. As we have noted, the Commission is required by statute to determine the standards for filing tariffs. The Commission is further required to determine the information that must be provided by every carrier participating with other carriers in a tariff. Finally, we have noted that the Commission is expected to further the transportation policy of the federal government, which, at the very least, bars secret arrangements among carriers and between carriers and shippers. The Commission was well within its mandate in dictating that every tariff must identify the carriers that are party to it.

In fulfilling the statutory mandate, the Commission designated participation via concurrence or powers of attorney. The ICC regulations prescribe a simple method for compliance with the statute and declare that tariffs that do not comply with important statutory mandates are void. Stated in another way, the regulation defines the essential elements of an effective tariff that refers to other tariffs that govern its terms.

Although the use of voiding as a method of compliance is potentially a harsh measure, we are satisfied that the Commission has not exceeded its discretion by determining that tariffs are void if they fail to comply with formalities that serve important statutory purposes.[13] A

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[13] We note that, of the vast number of technical requirements the Commission has placed on tariffs, only the requirement of formal participation is enforced with the voiding mechanism. We find no other regulation in which the ICC

stricter corrective measure – voiding tariffs *and* giving shippers an explicit right to overcharges – was upheld by the Supreme Court in *American Trucking* to remedy nonconforming tariffs. *American Trucking*, 467 U.S. 370. The public policy that the Commission seeks to enforce through the exercise of this mandate is one that has long been integral to the regulation of interstate commerce: the prevention of secrecy in the dealings among carriers and between carriers and favored shippers. Thus, we conclude that section 1312.4(d) was within the Commission's statutory authority.

IV

We have thus determined that section 1312.4(d) voids as a matter of law any tariff that has not complied with the regulation's provisions. We have determined that the Commission has the authority to issue such a provision. Consequently, both of Freightcor's tariffs – FSSI 282 and FTHS 275 – are void as a matter of law because neither complied with section 1312.4(d). Therefore, Freightcor can assert neither tariff as a basis for an action for undercharges under the filed rate doctrine. Thus, the district court erred in granting summary judgment and entering judgment in favor of Freightcor. Accordingly, we reverse the district court, vacate the judgment, and remand to the

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currently requires a carrier to comply with the regulation or find that its nonconforming tariff is "void as a matter of law."

district court with directions to enter a judgment for Vitro.

VACATED, REVERSED, and REMANDED.

BEST AVAILABLE COPY

No. 92-839

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1992

FREIGHTCOR SERVICES, INC.,

*Petitioner,*

*vs.*

VITRO PACKAGING, INC.,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether there is a rational basis for the I.C.C.'s interpretation of its regulation voiding a carrier's tariff for failure to execute an effective power of attorney authorizing participation in an agent's tariff.

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**APPENDIX**


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No. 92-839

In the

# Supreme Court of the United States

October Term, 1992

FREIGHTCOR SERVICES, INC.

*Petitioner,*

*vs.*

VITRO PACKAGING, INC.

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

## STATEMENT OF THE CASE

The Petitioner's writ of certiorari stems from the Fifth Circuit's decision reported at 969 F.2d 1563 (1992) which upheld the I.C.C.'s interpretation of its tariff regulations on the effect of a carrier's "reference" to another carrier's or agent's tariff without participating in that tariff.

Although the government has not participated in the proceedings below, the Court may deem it desirable to invite the

Solicitor General to submit the government's position on this case of first impression.

Respondent adopts Petitioner's statement of the case to the extent stated at pages 3 and 4 of its Petition herein, but offers the following pertinent tariff regulations omitted from Petitioner's Petition:

1. Section 1312.30 of Title 49 C.F.R. provides that when a carrier chooses to publish mileage rates rather than rates stated in cents per 100 lbs., it has three choices for publishing distances to be applied to mileage rates. Subsection 1312.30(c) requires carriers to either (i) publish the distances between all points for which mileage rates are published; (ii) attach a map to the tariff or; (iii) refer to a filed distance guide such as the Household Goods Carrier's Bureau Mileage Guide. The regulation requires the mileage tariff to be filed with the I.C.C., and allows a carrier to refer to another agent's mileage tariff. 49 C.F.R. § 1312.30(c)(4).

2. Section 1312.27(e) requires carriers that opt to incorporate a third party's tariff to also *participate* in that tariff.

3. Section 1312.10(b) requires such carriers to execute a power of attorney to the publisher of the incorporated tariff in order to accomplish the desired participation.

4. Section 1312.4(d) states that "tariffs are void as a matter of law" absent effective powers of attorney.

The I.C.C.'s tariff regulations thus further the filed rate doctrine with respect to the publication of mileage rates which depend upon two elements: 1) the rate per mile and 2) the distances between the origins and destinations to be multiplied by the appropriate rate per mile to determine the applicable freight charges. The regulations require both elements to be published in

filed tariffs and require the carrier to be listed as a participant in both tariffs. Tariffs which refer to another tariff for incorporation of their provisions are void absent an effective power of attorney.

## SUMMARY OF ARGUMENT

In *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), this Court reaffirmed the filed rate doctrine embodied in the Interstate Commerce Act (I.C.A.) which requires motor common carriers to publish and charge only the rates in tariffs filed with the Interstate Commerce Commission (I.C.C.) 49 U.S.C. § 10762(a)(1). Petitioner violated this central provision of the Act by failing to participate in the mileage tariff which it attempted to incorporate by reference for the computation of distances required to determine charges based on its mileage rates.

The I.C.C.'s tariff regulations provide that carriers opting to incorporate a mileage tariff into their rate tariffs must participate in the referred-to mileage tariff through the execution of powers of attorney. 49 C.F.R. §§ 1312.4(d) and 1312.30(c)(4). Petitioner failed to abide by this regulation and therefore was not listed as a participant in the mileage tariff to which it "referred."

Section 1312.4(d) of Title 49 C.F.R. provides that "tariffs are void as a matter of law" absent an effective power of attorney. Petitioner thus has no effective tariffs upon which to base its undercharge claims, and the Circuit Court below properly remanded the case to the District Court to dismiss the action.

## REASONS FOR DENYING THE WRIT

### I.

### THE COMMISSION'S REGULATIONS AT ISSUE ARE IN FURTHERANCE OF THE FILED RATE DOCTRINE.

The I.C.C.'s tariff regulations whose lawfulness was upheld by the Fifth Circuit Court of Appeals below were promulgated to give effect to the congressionally-mandated filed rate doctrine as expressed in 49 U.S.C. §§ 10761(a) and 10762(a)(1). The regulation at the root of the instant case (49 C.F.R. § 1312.4(d)) voids a carrier's tariff which "refers" to an agent's tariff as a governing publication unless the carrier participates in the referred-to tariff through the execution of a power of attorney as required by 49 C.F.R. § 1312.27(e). In the absence of a power of attorney, agents are prohibited from listing carriers as participating carriers in their tariffs. 49 C.F.R. § 1312.4(d). Therefore, when a carrier fails to participate in the referred-to mileage tariff, the absence of that carrier's name in that tariff is notice to the public that it has no filed tariff from which to compute distances, and therefore, no lawful mileage rates. This result was codified in the third sentence of § 1312.4(d):

> Absent effective concurrences or powers of attorney, tariffs are void as a matter of law.

Section 1312.4(d) is of such fundamental importance to the enforcement of the filed rate doctrine that the provision for voiding a tariff "as a matter of law" is found only in this section of the Commission's tariff regulations. Petitioner admits that it failed to comply with this requirement (Petition for Writ of Certiorari, Page 3). The court and Commission decisions supporting this result are legion. *See Appendix A* hereto. The decision below is in accord

with the filed rate doctrine and therefore certiorari should be denied.

## II.

## THE COMMISSION'S REGULATIONS DO NOT RESULT IN THE RETROACTIVE REJECTION OF TARIFFS.

Tariffs which are filed in violation of the Commission's tariff regulations requiring powers of attorney as a prerequisite to participation in third parties' tariffs are void *ab initio*, not "retroactively void" as contended by Petitioner. There is no "retroactive rejection" of a tariff if it never became effective, even though filed with the Commission.

Petitioner's attempt to invoke this Court's decision in *Interstate Commerce Commission v. American Trucking Associations* (hereinafter *American*), 467 U.S. 354 (1984), therefore, misses the mark. The statutory basis for Petitioner's position (49 U.S.C. § 10762(e)) is that the Commission *must* reject a tariff which violates its regulations. In fact, however, the statute is permissive.[1] After 1979, when the I.C.C. discontinued its tariff scrutiny activities due to severe reductions in manpower mandated by Congress,[2] many tariffs found their way into the I.C.C.'s tariff file containing unlawful rates and other provisions. The I.C.C. discontinued checking carriers' tariffs to determine if carriers were participating in referred-to tariffs. Therefore, many tariffs were improperly filed naming rates on "exempt" traffic, intrastate

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1. 49 U.S.C. § 10762(e) provides that "The Commission *may* reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section." (emphasis added).

2. *See American*, 467 U.S. at 360 n.4 (1984).

traffic, and referring to classifications[3] and mileage guides[4] not filed with the I.C.C., etc. Even fraudulently altered tariffs have been discovered in the I.C.C.'s Official Tariff Room.[5] Such "filings," however, do not constitute *lawful* tariffs or rates. *Cf. Arizona Grocery Co. v. Atchison Topeka & Santa Fe Railroad*, 284 U.S. 370, 384 (1932).

*American* does not prohibit the I.C.C.'s finding void a tariff which is *incomplete* on its face. Stated differently, the Commission's inadvertent acceptance of an incomplete tariff cannot fill the void created by the absence of a power of attorney to the publisher of the mileage guide or *the absence of the carrier's name in the "participating carriers" list published by the Household Goods Carrier's Mileage Guide*. When tariff users check Petitioner's tariffs, as required by the filed rate doctrine, and fail to find Petitioner's name as a participant in the mileage tariff, they are placed on notice of the fact that Petitioner has no uniform scale of distances to apply to its mileage rates, and therefore, it has no effective tariff on file at the I.C.C.

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3. *See* No. 40674, *Nat'l Motor Freight Traffic Assoc. — Petition for Cancellation of Tariffs That Refer to the Nat 'l Motor Freight Classification, But Are Filed By or on Behalf of Non-Participating Carriers*, 9 I.C.C. 2d 186 (1992).

4. *See also*, No. 40787, petition on behalf of the Household Goods Carrier's Bureau seeking a show cause order by the I.C.C. directing non-participating carriers to show cause why their tariffs referring to the mileage tariff should not be stricken (pending).

5. The U.S. Grand Jury in Philadelphia recently indicted the owner of a motor common carrier for allegedly substituting tariff pages in the I.C.C.'s Official Tariff Room. The defendant is alleged to have had a stamp manufactured to duplicate the I.C.C.'s official acknowledgment stamp to authenticate the altered tariff. Criminal No. 92-652, *United States of America v. L. Robert Tannenbaum and Arnold Montague*, E.D. Pa., Nov. 17, 1992.

Under the Interstate Commerce Act, the carrier's *duly* filed rate is the only lawful charge. *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94 (1915). Petitioner's tariffs were not "duly filed" due to its failure to execute a power of attorney to incorporate the HGB's mileage tariff into its rate tariff. *American*, on the other hand, involved a duly filed tariff which was effective. The defect in *American* was a substantive violation, *i.e.*, a lack of compliance with the rules governing rate bureau actions. *See Jasper Wyman & Son*, 8 I.C.C. 2d 246 at 259, n. 27. The Commission observed in *Jasper Wyman* that unlike the issue addressed in that case (which is identical to the issue involved in the instant case), the Court in *American* did not have to decide whether the tariff at issue had been *effectively* on file. *Id.* at 259.

In *Jasper Wyman*, as in the instant case, the carrier filed *no* mileage tariff with the Commission, nor did it provide any other uniform method of computing distances in its rate tariff. It "referred" to a mileage tariff, but its failure to "participate" in that tariff by being listed as a participating carrier created an incomplete rate tariff which never attained the status of a "filed" tariff. *Jasper Wyman*, 8 I.C.C. 2d at 259. Petitioner conveniently ignores this portion of the Commission's findings in *Jasper Wyman* at pages 10-11 of its Petition for obvious reasons; *i.e.*, it filed only one-half of the equation, namely the rate, but not the uniform scale of distances between all points served. This is not a mere "technically deficient" tariff, but rather, an incomplete tariff which is void *ab initio*. *Id.* at 259.

Petitioner, in desperation, attempts to characterize its failure to participate in the referred-to mileage tariff as a "secret rate agreement." (Petition For Writ of Certiorari, page 14). This argument is too preposterous to warrant rebuttal except to observe that the alleged intentional voiding of a carrier's tariff would void that tariff for *all* of its shippers, not just the mythical shipper intended to be given a preference.

Nor can Petitioner find comfort in this Court's decisions in *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924) or *Berwind-White Coal Mining Co. v. Chicago & E.R. R. R.*, 235 U.S. 371 (1914). The Court's decisions in these cases are distinguishable in that they involve tariffs which were duly filed with the Commission and contained only technical defects. Petitioner herein never had a distance tariff on file to apply in conjunction with its mileage rates, and therefore it had *no* effective tariff on file. *Cf. Jasper Wyman*, at 260.

Similarly, Petitioner improperly relies on *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905 (1983). In *Genstar*, there was an insufficient period of notice prior to the effective date. None of these cases were based on a statutory or regulatory provision stating that the "tariffs are void as a matter of law." Without a *complete* tariff, Petitioner has no basis for its undercharge claim and the case must be dismissed. If Petitioner attempts to seek the collection of other charges based on a higher class rate tariff, as suggested in its Petition, page 17, n. 4, shippers will have recourse to other defenses, such as the reasonableness of the tariff rates sought to be collected. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S. Ct. 2759, 2767 n. 10 (1990). However, no such claim was raised below and it may not be considered at this stage of the proceedings.

Petitioner cannot claim that it was not warned that it must participate in the mileage guide if it intended to refer to it. The HGB Mileage Guide 100-B, at 2, states the following:

**PARTICIPATING CARRIERS**

> For list of participating carriers refer to "Participating Carrier and Scope Tariff No. 101B, ICC HGB 101-B, Household Goods Carrier's Bureau, Agent, Supplements Thereto or Reissues Thereof." NOTE: This mileage guide may not be employed by a carrier as a

> governing publication for the purpose of determining interstate transportation rates based on mileage or distance, unless carrier is shown as a participant in the above named tariff.
>
> If a carrier is not listed as a participant, it may not use the Mileage Guide, even if the carrier had given its agent a power of attorney to effect that participation.

In effect, Petitioner is attempting to have the filed rate doctrine apply to its former customers but not to itself. It cannot have it both ways. The filed rate doctrine may have harsh results when strictly applied, but "what's sauce for the goose is sauce for the gander." Petitioner's claims based on the filed rate doctrine were properly dismissed by the court below for failure to have a lawful tariff on file.

## III.

## THE COMMISSION'S TARIFF REGULATIONS PREVENT DISCRIMINATION AND ARE ENTITLED TO JUDICIAL DEFERENCE.

The I.C.C.'s regulations as affirmed by the Circuit Court below comport with the congressional intent to prevent discrimination among shippers. Without a filed tariff publishing the distances between the points to which the carrier's mileage rates apply, the carrier has only one-half of the necessary equation for a mileage rate, *i.e.*, the rate per mile. The I.C.C.'s regulations give carriers three options for publishing a uniform system for determining the other half of the equation; *i.e.*, the distances between the points served.

49 C.F.R. § 1312.30(c)(4) provides that when a carrier desires

to publish mileage rates, the carrier may either 1) attach a road map to the tariff; 2) publish the mileages with each rate; or 3) refer to a mileage tariff on file with the I.C.C. Petitioner chose the latter method by "referring" to the Household Goods Carrier's Mileage Guide I.C.C. HGB 100, the standard mileage tariff in the industry. However, Petitioner failed to become a *participant* in that mileage tariff by executing the required power of attorney and paying the required participation fee each year. Therefore, Petitioner was never listed as a participating carrier in that tariff. The filed rate doctrine thus precludes Petitioner's reliance on its rate tariff as a lawful basis for the claims at issue herein. The Fifth Circuit properly reversed the lower court's finding to the contrary.[6]

The Fifth Circuit's findings comport with the statutory prohibition against unjust discrimination. Without a filed, uniform mileage tariff, a carrier could charge lower mileage rates to preferred shippers by using shorter distance routes for the computation of mileage rates regardless of the actual routes travelled. Petitioner's mileage rates were not based on actual distances — they attempted, unsuccessfully, to incorporate the uniform mileage scale published and filed by the HGCB. That tariff, however, *is notice to the public that Petitioner was not and never had been a participant.*

Without a uniform mileage tariff, Petitioner's rate tariff is in violation of 49 U.S.C. § 10743(b)(1). The Commission's decision to this effect was given due deference by the court below in accordance with the holding of this Court in *Stewart L. Udall v. James K. Tallman,* 380 U.S. 1 (1965) at 16 (deference to administrative interpretation is even more clearly in order when construction of an adminstrative regulation rather than a statute is

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6. The District Court below clearly erred by finding that the only requirement was for the mileage guide to be a filed tariff and therefore, Petitioner's mere reference to it without participation therein was sufficient (Appendix p. 3).

in issue. The ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation).

## IV.

## ALTERNATIVELY, IF PETITIONER'S TARIFF IS HELD TO BE RETROACTIVELY VOIDED, THE CIRCUIT COURT BELOW PROPERLY HELD THAT THE COMMISSION ACTED PURSUANT TO A SPECIFIC STATUTORY MANDATE.

The Circuit Court below held that Petitioner's tariffs are void as a matter of law and that in any event, the I.C.C. had the power to retroactively void an effective tariff if 1) to do so "furthers a specific statutory mandate of the Commission"; and 2) "the exercise of power is directly and closely tied to that mandate." *American*, 467 U.S. at 367. In justifying its decision, the Circuit Court acknowledged that the Commission has no power to "act affirmatively to void a tariff" under 49 C.F.R. § 1312.4(d). That regulation merely defines when a tariff *becomes effective* or *becomes void* through the action or inaction of a carrier (Appendix p. 20).

The court below then found that the statutory mandate is the Commission's power to regulate carriers' tariffs in furtherance of the National Transportation Policy. Specifically, the Court upheld the Commission's duty under § 10762(a)(1) to "require the disclosure of the identity of the carriers participating in every tariff" (such as the Household Goods Carrier's Mileage Guide and the National Motor Freight Classification) (Appendix p. 24). It then held that this power was "tied to the statute as a necessary means of enforcing the Interstate Commerce Act." (Appendix p. 25).

Thus, the Commission designated *participation* via powers of attorney as the critical act when a filed tariff attempts to incorporate another publication (Appendix, p. 25). The mere *filing* of a document with the I.C.C. does not create a lawful tariff.

The harsh remedy of voiding tariffs under these circumstances was specifically approved by this Court in *American.* The Commission's regulations and the Fifth Circuit's approval thereof are in accord with the statute and the law.

## V.

## THE COURTS OF APPEAL ARE NOT IN CONFLICT ON THE ISSUE AT HAND.

Petitioner has strained the Ninth Circuit Court of Appeal's decision in *I.C.C. v. Transcon Lines,* 968 F.2d 798 (1992), *rehearing denied,* (9th Cir. Nov. 24, 1992) in an attempt to create a conflict with the decision below when in fact there is no conflict. The Fifth Circuit's decision below upholds a Commission tariff regulation which is in furtherance of the filed rate doctrine. It does not "void a filed tariff" as alleged.

*Transcon,* on the other hand, involves a regulation[7] promulgated by the I.C.C. pursuant to its statutory mandate[8] to regulate the manner in which carriers extend credit to shippers. *Transcon is* not in conflict with the instant case since they involve substantially different regulatory concepts, namely, 1) the requirement for execution of powers of attorney when a carrier delegates to others its duty to publish and file tariffs *(Vitro);* and 2) the Commission's statutory duty to regulate the extension of credit *(Transcon).* In this case the tariff filing is invalid due to the

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7. 49 C.F.R. § 1320.

8. 49 U.S.C. § 10743(b)(1).

carrier's violation of the Commission's tariff regulations. In *Transcon,* the tariff was in effect but the carrier violated the Commission's regulations regarding its non-discriminatory extension of credit. Regardless of the propriety of the Ninth Circuit's decision in *Transcon*[9], there is no conflict between the Circuits on the issue before this Court herein.

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9. The I.C.C. is requesting a stay of mandate pending the Solicitor General's review of the I.C.C.'s decision to appeal this portion of the Ninth Circuit's decision.

## CONCLUSION

The judgment of the Fifth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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**APPENDIX A — LIST OF COURT DECISIONS AND ICC DECISIONS GRANTING JUDGMENT TO DEFENDANTS ON THE ISSUE OF THE CARRIER'S FAILURE TO PARTICIPATE IN THE HOUSEHOLD GOODS CARRIER'S BUREAU MILEAGE TARIFF OR THE NATIONAL MOTOR FREIGHT CLASSIFICATION (AS OF 12/4/92)**

COURT OF APPEALS

*Freightcor Services Inc. v. Vitro Packaging Inc.*, 969 F.2d. 1563, 1992 WL 195842 (5th Cir. Aug. 14, 1992)

DISTRICT COURTS

*Amoco Fabrics and Fibers Company v. A.T.F. Trucking, Inc.*, 1992 Fed. Carr. Cas. (CCH) ¶ 37,969 (ICC Dec. No. 40526, Feb. 18, 1992), *aff'd sub nom., ATF Trucking Co. Inc. v. Amoco Fabrics & Fibers Co.*, 1992 Fed.Carr.Cas. ¶ 83,787 (N.D. Ala. Sept. 17, 1992)

*Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, 1992 WL 195426 (Civ. No. 4-90-254) (D. Minn. March 6, 1992) *Appeal to 8th Circuit [No. 92-1771 MNMI (April 3, 1992, 8th Cir.)]

*Brizendine Trustee on behalf of Brown Transport Truckload, Inc. et al. v. Cotter & Company*, No. 91 C 6761 (N.D. Ill. July 22, 1992) *Appeal to 7th Circuit

*Brizendine v. United States Gypsum Co.*, No. 91 C 6754 (N.D. Ill. Sept. 22, 1992)

*Brown Transport Truckload Inc. v. Campbell Soup Company*, __B.R __, 1992 WL 151206 (Bankr. N.D. Ga. July 1, 1992) *Appeal to District Court, N.D. Ga.

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*Brown Transport Truckload, Inc. v. Golden Dipt Company*, 1992 Fed.Carr.Cas. ¶83,778 (Bankr. N.D. Ga. July 1, 1992)
*Appeal to District Court, N.D. Ga.

*Brown Transport Truckload Inc. v. James River Corporation of Virginia*, Adv. No. 91-6963A (Bankr. N.D. Ga. June 5, 1992)
*Appeal to District Court, N.D. Ga.

*Brown Transport Truckload Inc. v. James River Corporation Dixie Products Div.*, Adv. No. 91-6955A (Bankr. N.D. Ga. June 5, 1992)
*Appeal to District Court, N.D. Ga.

*Brown Transport Truckload, Inc. v. Kumho U.S.A., Inc.*, 1992 Fed.Carr.Cas. ¶ 83,779 (Bankr. N.D. Ga. July 1, 1992)
*Appeal to District Court, N.D. Ga.

*Brown Transport Truckload, Inc. v. Richter Distributinq Company*, 1992 Fed.Carr.Cas. ¶ 83,780 (Bankr. N.D. Ga. July 24, 1992)
*Appeal to District Court, N.D. Ga.

*Canny Trucking, Inc. v. Anitec Image Corp.*, 1992 Fed.Carr.Cas. ¶ 83,782 (N.D.N.Y. June 24, 1992)

*In re: Columbia Navigation. Inc. v. Teton West Lumber Sales*, Civ. No. 89-30176-JLP (D. MT., Great Falls Div., July 28, 1992)

*Crest Truck Lines, Inc. v. Cornucopia Natural Foods, Inc.*, __ F. Supp. __,1992 WL 200021 (D. R.I. Aug. 12, 1992)

*F.P. Corp. v Golden West Foods Inc.*, 1992 Fed.Carr.Cas. ¶ 83,783 (W.D. Va. July 28, 1992)

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*F.P. Corporation v. Twin Modal, Inc.*, 1992 Fed.Carr.Cas. ¶ 83,784 (D. Minn. May 4, 1992)
*Appeal to 8th Circuit [No. 92-2258 MNMI (May 21, 1992, 8th Cir.)]

*In re: Columbia Navigation, Inc. v. Teton West Lumber Sales,* 1992 Fed.Carr.Cas. ¶ 83,785 (D. Mont. July 28, 1992)
*Appeal to 9th Circuit

*Security Services. Inc. v. All Freight Services. Inc.,* 1992 Fed.Carr.Cas. ¶ 83,788 (S.D. Cal. May 4, 1992)
*Appeal to 9th Circuit

*Security Services Inc. f/k/a Riss International Corp. v. Centerline Industries and Traffic Paint Mfg.*, No. 91-2224C(8) (E.D. Mo. Oct. 8, 1992)

*Security Services, Inc. v. Cramer Products Inc.*, 1992 Fed.Carr. Cas. ¶ 83,789 (W.D. Mo. July 14, 1992)

*Security Services. Inc. v. Friedrich Air Conditioning and Refrigeration*, Civil Action H-91-3227 (S.D. Tex. May 15, 1992)

*Security Services Inc. f/k/a Riss Int'l Corp. v. Garvey Corp.*, Civil Action No 91-4789(JBS) (D. N.J. Oct. 23, 1992)

*Security Services, Inc. v. India Teximpor, Inc.*, No. 92-1042 (D. N.J. Sep. 30, 1992)
*Appeal to 3rd Circuit

*Security Services, Inc. v. James River Corp. of Virginia*, 1992 Fed.Carr.Cas. ¶ 83,791 (E.D. Va. Sept. 8, 1992)

*Appendix A*

*Security Services, Inc. v. John H. Harland Company*, Civil File No. 91A 50388-5 (Decalb Co., Ga. Oct 12, 1992)

*Security Services, Inc. f/k/a Riss International v. K MART Corp.*, Case No. 91-CV-6782 (E.D. Pa. Sept. 8, 1992)
*Appeal to 3rd Circuit

*Security Services, Inc. f/k/a Riss International v. P-Y Transportation, Inc. f/k/a C.T.S Brokerage, Inc.*, Case No. 1:91CV2192 (N.D. Ohio Aug. 26, 1992)
*Appeal to Sixth Circuit, C.A. #92-3992

*Security Services, Inc. v. Riverwood International Corp.*, 1992 Fed.Carr.Cas. ¶ 83.792 (W.D. La. July 1, 1992)
*Appeal to 5th Circuit

*Security Services, Inc. v. RPL Associates*, Civil Action No. 91-CV-75705-DT (E.D. Mich. July 27, 1992)
*Appeal to 6th Circuit

*Security Services, Inc. v. Snomax, Inc. d/b/a Airmax, Inc.*, 1992 Fed.Carr.Cas. ¶ 83,793 (S.D. Tex. Aug. 31, 1992)

*Wonderoast - Petition for Declaratory Order*, 8 I.C.C.2d 272 (ICC Dec. No. 40387, Feb. 14, 1992), *aff'd sub nom., Transportation Systems International, Inc. v. Wonderoast, et al.*, 1992 Fed.Carr.Cas. ¶ 83,786 (Bankr. D. Minn. June 26, 1992)

STATE COURTS

*Security Services, Inc. v. Georgia-Pacific Corp.*, 1992 Fed.Carr.Cas. ¶ 83,790 (Fulton Co., Ga. August 24, 1992)
*Appeal to Georgia State Court of Appeals

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*Security Services, Inc. v. Sweetheart Cup Company, Inc.*, Civ. Action No. 92VS46930-F (Fulton Co., Ga. August 7, 1992)

*Security Services, Inc. v. John H. Harland Company*, Civil File No. 91A 50388-5 (DeKalb Co., Ga. Oct. 12, 1992)
*Appeal to Georgia State Court of Appeals

I.C.C. DECISIONS

*7/24 Freight Sales, Inc. v. Atlantis Express, Inc.*, 1992 Fed. Carr. Cas. (CCH) ¶ 37,982 (ICC Dec. No. 40477, April 27, 1992)

*Friedman Bag Company, Inc. v. A.T.F. Trucking, Inc.*, 1992 Fed. Carr. Cas. (CCH) ¶ 37,986 (ICC Dec. No. 40599, May 22, 1992)

*Jasper Wyman & Son, et. al.— Petition for Declaratory Order— Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C.2d 246 (ICC Dec. No. 40510, Jan. 30, 1992)
*Appeal to District of Columbia Circuit

*Menasha Corp., et al v. United Shipping Co., Inc.*, 1992 Fed. Carr. Cas. (CCH) ¶ 37,977 (ICC Dec. No. 40602, April 29, 1992)

*The B F Goodrich Company—Petition for Declaratory Order— Certain Rates and Practices of Freightcor Services, Inc.*, No. 40516, Dec. 1, 1992. (Embraces seven cases referred by various courts to the ICC)

*E.A. Miller, Inc. — Petition for Declaratory Order—Certain Rates and Practices of F.P. Corp.*, No. 40799, Nov. 17, 1992

*Roberts & Dybdahl, Inc.—Petition for Declaratory Order— Certain Rates and Practices of Rose-Way, Inc.*, No. 40755, Nov. 20, 1992